

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued May 17, 2005

Decided August 23, 2005)

5 Docket No. 04-3927-cv

6 -----  
7 DONNA S. JUTE,

8 Plaintiff-Appellant,

9  
10 v.

11 HAMILTON SUNDSTRAND CORP.,

12 Defendant-Appellee.  
13 -----

14 B e f o r e: MESKILL, NEWMAN and CABRANES, Circuit Judges.

15 Appeal from summary judgment entered in the United  
16 States District Court for the District of Connecticut, Covello,  
17 J., dismissing federal and state employment retaliation claims,  
18 the court having found that plaintiff failed to establish a prima  
19 facie case.  
20

21 Affirmed in part, vacated in part, and remanded.

22 BARBARA E. GARDNER, Manchester, CT,  
23 for Appellant.

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25 Howard, Hartford, CT (Daniel  
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28 Hartford, CT, of counsel),  
29 for Appellee.  
30

31 JASON M. MAYO, Equal Employment  
32 Opportunity Commission,  
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7 Commission, Washington DC, of  
8 counsel),  
9 for Amicus Curiae Equal  
10 Employment Opportunity  
11 Commission.

12 MESKILL, Circuit Judge:

13 In this appeal from a summary judgment entered in the  
14 United States District Court for the District of Connecticut,  
15 Covello, J., we are asked to determine the scope of Title VII's  
16 anti-retaliation clause forbidding an employer from retaliating  
17 against an employee who has "testified, assisted, or participated  
18 in any manner" in a Title VII related proceeding. We previously  
19 have held that an employee who offers testimony in a Title VII  
20 lawsuit squarely engages in a form of statutorily protected  
21 activity. We now determine that such protection extends to an  
22 employee who is named as a voluntary witness in a Title VII suit,  
23 but who is never called on to testify. Our previous  
24 interpretation of the anti-retaliation clause and the  
25 congressional intent behind Title VII lead us to this conclusion.  
26 We therefore affirm the district court's determination that the  
27 employee in this case "participated" in protected activity for  
28 the purposes of alleging her retaliation claims.

29 However, we conclude that the district court erred in

1 its summary dismissal of those claims. First, the court  
2 neglected to recognize and weigh certain adverse employment  
3 actions as relevant background evidence, and second, it  
4 impermissibly limited the suit to only those accusations  
5 explicitly raised in a retaliation charge filed with the Equal  
6 Employment Opportunity Commission (EEOC). Finally, we hold that  
7 the district court prematurely dismissed an allegation that the  
8 defendant-employer retaliatorily furnished a negative job  
9 reference. Absent these errors, a factual record sufficient to  
10 withstand summary judgment exists.

11 Therefore, we affirm the judgment of the district court  
12 in part, vacate it in part, and remand for trial.

13 I.

14 As we must, we relate the facts of this dispute in the  
15 light most favorable to the plaintiff.

16 In August 1986, Donna S. Jute began working for  
17 Hamilton Sundstrand Corp. (Hamilton), a corporation headquartered  
18 in Connecticut that designs and manufactures aerospace products.  
19 For approximately fourteen years she worked in various hourly  
20 wage positions with the company. On January 11, 2000, Jute was  
21 terminated along with nineteen other employees in her pay grade.  
22 Hamilton asserts that Jute's termination was the result of a  
23 post-merger reorganization, whereas Jute claims it was  
24 retaliatory.

1           Specifically, Jute contends that Hamilton began to  
2     retaliate against her immediately after she was named as a  
3     witness in a co-worker's Title VII lawsuit.<sup>1</sup> The plaintiff in  
4     that case, Maryanne Brunton, claimed that in June 1994 -- while  
5     she campaigned for an executive board position with the union  
6     representing Hamilton's hourly employees -- sexually disparaging  
7     flyers about her were posted throughout the workplace. In  
8     response to these postings, Hamilton initiated an internal  
9     investigation. Apparently at both Brunton's and Hamilton's  
10    separate requests, Jute provided two statements to investigators  
11    in which she attested to witnessing a female co-worker leave the  
12    denigrating flyers in a company restroom.

13           Based on the foregoing incident, in December 1995,  
14    Brunton sued Hamilton, as well as her union and its president,  
15    alleging that she had been subjected to a hostile work  
16    environment. See 42 U.S.C. § 2000e et seq. The Brunton  
17    litigation progressed for approximately three years, during which

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<sup>1</sup> We note that Jute argued in the district court that her involvement in protected activity pre-dated the Brunton litigation by some eight years, given that in 1990 she had lodged an internal complaint of sexual harassment against a supervisor. The district court concluded that the filing of this complaint qualified as protected activity, but deemed that it was "far too remote in time to be causally linked to any of the adverse actions" which, as we discuss below, occurred in 1999 or 2000. Jute v. Hamilton Sundstrand Corp., 321 F.Supp.2d 408, 418-19 (D. Conn. 2004). Jute does not challenge this holding on appeal. Accordingly, this issue is deemed abandoned. See Perez v. Hoblock, 368 F.3d 166, 171 (2d Cir. 2004).

1 time Jute's 1994 statements to the Hamilton investigators were  
2 incorporated into the record. In addition, Jute agreed to  
3 testify on Brunton's behalf. To that end, Jute saved several  
4 vacation days to ensure that she could readily take time off from  
5 work to be deposed. Moreover, during a deposition conducted on  
6 July 9, 1998, Brunton named Jute as the sole witness who had  
7 observed another employee posting the flyers in the women's  
8 restroom. Before Jute was called to offer deposition testimony  
9 of her own, the Brunton lawsuit settled.

10 The day after Brunton's July 9, 1998 deposition, Jute  
11 claims that she heard her supervisor, Natonia Crowe-Hagans,  
12 angrily "storming down the hall" toward Jute's workstation.  
13 Crowe-Hagans confronted Jute and removed her from a team (the  
14 "JDE team") that was upgrading Hamilton's computer system, even  
15 though she had been working as a technician with the team for  
16 well over a year. Jute suggests that this demotion was  
17 particularly suspect given that, in a formal performance  
18 appraisal, a supervisor had deemed her work with the team to be a  
19 "tremendous asset," and in July 1998 the project was at a  
20 critical stage. In addition, the post with the JDE team offered  
21 Jute a unique opportunity for career advancement at Hamilton.  
22 Jute asserts, for example, that she had been promised a salaried  
23 position or a pay raise if her productivity with the team  
24 continued.

1           Initially, Jute did not suspect that her removal was  
2 traceable to the Brunton litigation. In December 1998, however,  
3 Jute contacted Brunton to ask whether she would be deposed  
4 sometime in early December, otherwise she was prepared to use her  
5 saved vacation days during the Christmas holiday. It was during  
6 this conversation that Jute learned for the first time that the  
7 case had settled, and more significantly, that Brunton had named  
8 Jute as a favorable witness during the July 9 deposition. Now  
9 suspicious, Jute approached Hamilton's Manager of Human  
10 Resources, Ingrid Delgado, about the situation. According to  
11 Jute, Delgado instructed her to "find another job" as the  
12 harassment was "never going to stop." In this suit, Jute points  
13 to Delgado's statement as direct proof of retaliatory animus.

14           In addition to the removal from the JDE team, Jute  
15 alleges that after Brunton's deposition, and over the course of  
16 two years, Hamilton engaged in numerous other retaliatory acts.  
17 First, in August 1998, Hamilton informed Jute that she was no  
18 longer needed to teach an evening aerobics class at Hamilton, a  
19 position Jute sought to supplement her income. Second, in  
20 September 1998, Hamilton elected not to promote Jute to a higher  
21 pay grade despite Crowe-Hagans' alleged earlier promise to do so.  
22 Third, in September 1998, Jute served as a "cutoff" for promotion  
23 training, meaning that Jute and employees less senior than she

1 could receive a promotion only if they worked nights.<sup>2</sup> Fourth,  
2 in September 1999, Jute was denied a promotion despite having  
3 completed the requisite training. Fifth, in September 1999,  
4 Hamilton denied the JDE team leader's request that Jute accompany  
5 the team on business trips.<sup>3</sup> Sixth, in December 1999, Jute was  
6 denied a salaried position with Hamilton -- a position that might  
7 have insulated Jute from layoffs aimed at hourly employees that  
8 were part of a post-merger corporate restructuring. Seventh, as  
9 part of the restructuring, Jute was fired in January 2000.  
10 Finally, Jute claims that following her termination she was  
11 "blackballed" when she was not referred to International Fuel  
12 Cells (IFC), a company related to Hamilton, for future  
13 employment. Thus, while other former Hamilton employees with  
14 less experience than Jute were interviewed and hired by IFC in  
15 the winter and spring of 2000, IFC never contacted Jute.

16 On May 18, 2000, Jute filed a charge of discrimination  
17 with the Connecticut Commission on Human Rights and Opportunities  
18 (CCHRO) and with the EEOC. In the charges, Jute specifically  
19 alleged that Hamilton retaliatorily (1) terminated her in January

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<sup>2</sup> Due to concerns over who would care for her young daughter during the evening hours, Jute declined to enter the evening training program. Despite declining the opportunity, Hamilton eventually elected to train Jute for potential promotion on the day shift.

<sup>3</sup> Although, as already discussed, Jute had been removed from the JDE team a year earlier.

1 2000; (2) denied her a salaried position in January 2000, making  
2 her vulnerable to the impending layoff; and (3) withheld a  
3 promotion in September 1999, although she had completed the  
4 necessary training. On October 5, 2000, the CCHRO dismissed  
5 Jute's charge, finding that further review was not likely to  
6 reveal a wrongful firing. Separately, on December 5, 2000, the  
7 EEOC issued a right to sue letter.

8 While her administrative charges were pending before  
9 the CCHRO and EEOC, Jute secured an interview for a position with  
10 IFC. Jute claims that she was offered a job with the company in  
11 November 2000, but that the offer was subsequently withdrawn.  
12 Jute contends that the position was rescinded because of comments  
13 her former supervisor, Byron Yost, made during a reference check.  
14 Yost apparently advised an inquiring IFC representative that he  
15 had been directed not to discuss matters pertaining to Jute  
16 because she "had a lawsuit pending" against Hamilton.  
17 Technically, this comment was not true. At that time Jute had  
18 only filed administrative charges with the EEOC and CCHRO.

19 II.

20 Two months after Yost's comment, in January 2001, Jute  
21 filed a complaint against Hamilton alleging retaliation under  
22 Title VII and Connecticut state law.<sup>4</sup> See 42 U.S.C. § 2000e et

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<sup>4</sup> Connecticut courts examine federal precedent for guidance in construing Connecticut's anti-discrimination statute. See, e.g., Levy v. Commission on Human Rights & Opportunities, 236

1 seq.; Conn. Gen. Stat. § 46a-60 et seq. Following numerous  
2 settlement attempts and a period of discovery, Hamilton moved for  
3 summary judgment dismissing the complaint. In a comprehensive,  
4 twenty-two page published opinion, the district court granted the  
5 request on the basis that Jute failed to establish a prima facie  
6 case of retaliation. See Jute v. Hamilton Sundstrand Corp., 321  
7 F.Supp.2d 408, 419 (D. Conn. 2004). In so doing, the district  
8 court agreed with all of Hamilton's arguments but one, agreeing  
9 with Jute that her involvement in the Brunton litigation  
10 constituted "protected activity." See id. at 416. As for Jute's  
11 further involvement in protected activity, the district court  
12 noted that -- as Hamilton conceded -- it would have been unlawful  
13 to retaliate against Jute because she had filed charges with the  
14 CCHRO and EEOC.<sup>5</sup> See id.

15 The district court then proceeded to consider whether  
16 Jute had been subjected to any adverse employment actions. It  
17 held that Jute was time-barred from raising as actionable conduct

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Conn. 96, 103, 671 A.2d 349, 355 (1996). Accordingly, the state and federal claims are coextensive, and thus we need not and do not analyze them separately.

<sup>5</sup> Before the district court, Jute also maintained that the two statements she provided in 1994 during Hamilton's internal investigation constituted protected activity. The district court disagreed, holding that Jute completely failed to put forth evidence that the investigation was conducted pursuant to Title VII. See Jute, 321 F.Supp.2d at 415. Neither Jute nor the EEOC, as amicus curiae, have challenged this holding. The issue has therefore been abandoned. See Perez, 368 F.3d at 171.

1 those alleged adverse employment actions that occurred before  
2 July 23, 1999, because they amounted to discrete acts occurring  
3 more than three hundred days before the filing of the CCHRO and  
4 EEOC charges. See id. at 417. Consequently, the district court  
5 ruled that it could "not consider" these alleged instances of  
6 adverse employment action, which formed the lion's share of  
7 Jute's claims. Id.

8 The court also held that it could not "consider"  
9 actions occurring within three hundred days of the filing of the  
10 EEOC charge unless they were specifically pled before the EEOC.  
11 Id. at 418. On this basis, the district court refused to examine  
12 Jute's allegations regarding the September 1999 retaliatory  
13 refusal to authorize travel with the JDE team, or the January  
14 2000 retaliatory refusal to list her name to IFC for potential  
15 hire. See id.

16 Based on the time-bar and failure-to-plead rulings, the  
17 district court strictly limited itself to a consideration of the  
18 following alleged adverse employment actions: (1) the September  
19 1999 promotion denial; (2) the January 2000 decision not to  
20 elevate Jute to a salaried position; (3) the January 2000  
21 termination; and (4) the November 2000 comments made during the  
22 IFC reference check. See id. With the evidence so narrowed, the  
23 district court held that there existed a "significant lapse[] of  
24 time" between the protected activity on the one hand (i.e., the

1 July 1998 disclosure of Jute as a witness in the Brunton  
2 litigation), and the first instance of adverse employment action  
3 considered by the court on the other hand (i.e., the September  
4 1999 promotion denial). Id. The court thus reasoned that these  
5 events were temporally "too far removed" to satisfy Title VII's  
6 causal link element. Id. at 419.

7 But, the district court did hold that there existed  
8 some temporal proximity between a protected activity and an  
9 alleged instance of adverse action. Specifically, the court  
10 ruled that the statements Yost made during IFC's reference check  
11 in November 2000 were close enough in time to Jute's May 2000  
12 CCHRO and EEOC filings to support an inference of causation. See  
13 id. Nonetheless, the district court held that even these events  
14 did not present a triable issue because Jute did not submit an  
15 affidavit or direct proof from an IFC representative to show that  
16 Hamilton's statements "'caused or contributed to [her] rejection  
17 by [IFC].'" Id. (quoting Sarno v. Douglas Elliman-Gibbons &  
18 Ives, 183 F.3d 155, 160 (2d Cir. 1999)). The district court thus  
19 held that Jute had failed to present a prima facie case of  
20 retaliation. Accordingly, the claims were dismissed and this  
21 timely appeal followed.

### 22 III.

23 We review de novo the district court's grant of summary  
24 judgment, see Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir.

2003), construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, see Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). "A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202 (2d Cir. 1995). In some respects then, summary judgment may be viewed as a "drastic procedural weapon because its prophylactic function, when exercised, cuts off a party's right to present his case to the jury." Garza v. Marine Transp. Lines, 861 F.2d 23, 26 (2d Cir. 1988) (internal quotation marks omitted).

Title VII forbids any employer from "discriminat[ing] against any of [its] employees . . . because he has made a charge, testified, assisted, or participated in any manner in a [Title VII] investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). Retaliation claims under Title VII are evaluated under a three-step burden-shifting analysis. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998).

First, the plaintiff must establish a prima facie case. That is, an employee must show "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection

1 between the protected activity and the adverse employment  
2 action." McMenemy v. City of Rochester, 241 F.3d 279, 282-83 (2d  
3 Cir. 2001). The burden of proof that must be met to permit a  
4 Title VII plaintiff to survive a summary judgment motion at the  
5 prima facie stage has been characterized as "'minimal' and 'de  
6 minimis.'" Woodman v. WWOR-TV, 411 F.3d 69, 76 (2d Cir. 2005)  
7 (quoting Zimmerman v. Assocs. First Capital Corp., 251 F.3d 376,  
8 381 (2d Cir. 2001). In determining whether this initial burden  
9 is satisfied in a Title VII retaliation claim, the court's role  
10 in evaluating a summary judgment request is to determine only  
11 whether proffered admissible evidence would be sufficient to  
12 permit a rational finder of fact to infer a retaliatory motive.  
13 See Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58  
14 (2d Cir. 1987).

15 If a plaintiff sustains the initial burden, a  
16 presumption of retaliation arises. In turn, under the second  
17 step of the burden-shifting analysis, the onus falls on the  
18 employer to articulate a legitimate, non-retaliatory reason for  
19 the adverse employment action. See Quinn, 159 F.3d at 768.  
20 Finally, as for the third step, once an employer offers such  
21 proof, the presumption of retaliation dissipates and the employee  
22 must show that retaliation was a substantial reason for the  
23 adverse employment action. See Fields v. New York State Office  
24 of Mental Retardation & Developmental Disabilities, 115 F.3d 116,

1 120-21 (2d Cir. 1997). In this regard, a retaliation claim  
2 follows the familiar burden-shifting framework developed to  
3 evaluate allegations of disparate treatment. See McDonnell  
4 Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Reed v. A.W.  
5 Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996)

6 As noted earlier, the district court determined that  
7 Jute was unable to establish a prima facie case and consequently  
8 dismissed the suit. It is to the propriety of this decision that  
9 we now turn.

10 A. By Being Named as a Potential Witness, Did Jute  
11 "Participate" in a Title VII Case?

12 Section 704(a) of Title VII provides protection for two  
13 distinct classes of employees: first, those opposing  
14 discrimination proscribed by the statute and second, those  
15 participating in Title VII proceedings. To be specific, the so-  
16 called anti-retaliation clause of § 704(a) reads, in pertinent  
17 part:

18 It shall be an unlawful employment practice for an  
19 employer to discriminate against any of [its] employees  
20 . . . because he has opposed any practice made an  
21 unlawful employment practice by this subchapter, or  
22 because he has made a charge, testified, assisted, or  
23 participated in any manner in an investigation,  
24 proceeding, or hearing under this subchapter.

25  
26 42 U.S.C. § 2000e-3(a) (emphasis added). The district court held  
27 that Jute's involvement in the Brunton litigation qualified as  
28 "participation" in a Title VII related proceeding. On appeal,

1 Hamilton raises this threshold issue, arguing that Jute's  
2 involvement in the Brunton suit was too attenuated to so qualify.  
3 We disagree.

4 We recently had occasion to consider the scope of  
5 § 704(a)'s participation clause. In Deravin v. Kerik, we  
6 explained that its "explicit language . . . is expansive and  
7 seemingly contains no limitations." 335 F.3d 195, 203 (2d Cir.  
8 2003). This determination rested on the statute's use of the  
9 phrase "participate[] in any manner." Id. We found that these  
10 words evinced Congress' intent to confer exceptionally broad  
11 protection as "'the word 'any' has an expansive meaning,' and  
12 thus, so long as 'Congress did not add any language limiting the  
13 breadth of that word,' the term 'any' must be given literal  
14 effect." Id. at 204 (quoting United States v. Gonzales, 520 U.S.  
15 1, 5 (1997)). Against this backdrop, we held that an employee  
16 who involuntarily testified in an employment discrimination case  
17 about his own allegedly discriminatory conduct had participated  
18 in a Title VII proceeding. Id. at 205.

19 In this case we face a slightly different circumstance.  
20 Here, Jute volunteered to offer testimony to support another's  
21 discrimination lawsuit, but she was never called on to do so.  
22 Guided by our previous definition of the anti-retaliation clause  
23 and by the need to "interpret [the] provision in light of Title  
24 VII's overall remedial purpose," id. at 204, we draw no

1 significant distinction between Deravin and the instant case.

2 First, as we must, we begin with the text of the  
3 relevant statute. See Robinson v. Shell Oil Co., 519 U.S. 337,  
4 340 (1997); see also Castellano v. City of New York, 142 F.3d 58,  
5 67 (2d Cir. 1998). As already stated, the anti-retaliation  
6 clause protects an individual who has "participated in any  
7 manner" in a Title VII related proceeding. 42 U.S.C. § 2000e-  
8 3(a). The plain meaning of the term "participate" provides each  
9 side in the pending appeal with helpful language. On one hand,  
10 helpful to Hamilton, some authorities define participation as  
11 requiring some deliberate, affirmative action. See, e.g.,  
12 Black's Law Dictionary 1151 (8th ed. 2004) (defining  
13 "participation" as "[t]he act of taking part in something, such  
14 as a partnership, a crime, or a trial"); American Heritage  
15 College Dictionary 995 (3d ed. 2000) (defining "participate" as  
16 "[t]o take part in something"). On the other hand, other  
17 authorities define participation as encompassing the kind of  
18 involvement that Jute had in the Brunton litigation. See, e.g.,  
19 XI Oxford English Dictionary 268 (2d ed. 1989) (defining  
20 participation as "[a] taking part, association, or sharing (with  
21 others) in some action or matter"); Webster's Third New  
22 International Dictionary 1646 (1993) (defining participate as "to  
23 have a part or share in something"). These latter definitions  
24 are helpful to Jute: having been named as a voluntary witness who

1 had agreed to offer testimony on matters relevant to Brunton's  
2 case, it may be plausibly argued that Jute "ha[d] a part" in or  
3 an "association" with the Brunton litigation. Thus, because the  
4 anti-retaliation clause sweeps broadly through the phrase "in any  
5 manner," a circumstance we recognized in Deravin, we might be  
6 justified in resolving the matter by resorting only to the plain  
7 language of the statute.

8 But, we need not resolve the issue solely on this  
9 basis. We find additional support in that canon of statutory  
10 construction that allows us to consider the broader context of  
11 the statute as a whole to ensure that statutory language is  
12 defined in accordance with a statute's overall purpose. See Bob  
13 Jones Univ. v. United States, 461 U.S. 574, 586 (1983); see also  
14 Robinson, 519 U.S. at 345-46.

15 Title VII combats unlawful employment practices, and it  
16 does so principally through reliance on employee initiative. In  
17 recognition of this fact, Congress enacted the anti-retaliation  
18 clause to shield an employee from employer retaliation following  
19 the employee's attempt to challenge discriminatory conduct. The  
20 Supreme Court has therefore opined that a primary purpose of  
21 § 704(a) is to "[m]aintain[] unfettered access to statutory  
22 remedial mechanisms." Robinson, 519 U.S. at 346.

23 It would be destructive of this purpose to leave an  
24 employee who is poised to support a co-worker's discrimination

1 claim wholly unprotected. Accepting Hamilton's argument would  
2 mean, for example, that an employer could freely retaliate  
3 against a Title VII whistleblower, as long as it did so before  
4 the employee actually testified. Placing a voluntary witness  
5 into this kind of legal limbo would impede remedial mechanisms by  
6 denying interested parties "access to the unchilled testimony of  
7 witnesses." Glover v. South Carolina Law Enforcement Div., 170  
8 F.3d 411, 414 (4th Cir. 1999). Thus, declining to extend  
9 § 704(a) to an employee like Jute would thwart the congressional  
10 intent underlying the anti-retaliation clause.

11 Based on the foregoing, and accepting all of Jute's  
12 allegations as true, we hold that Jute is entitled to protection  
13 from retaliation by virtue of her involvement in the Brunton  
14 litigation. The record before us shows that Jute had  
15 collaborated with Brunton, such that Brunton candidly named Jute  
16 as a voluntary and favorable witness. Moreover, the record  
17 indicates that Jute planned to testify on Brunton's behalf: as  
18 Jute testified in this case, she had saved vacation days so that  
19 she would be immediately available for deposition in the Brunton  
20 litigation when finally called. Cf. Gifford v. Atchison, Topeka  
21 & Santa Fe Ry., 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) (holding  
22 that there existed "no legal distinction . . . between the filing  
23 of a charge [with the EEOC], which is clearly protected, and  
24 threatening to file a charge") (internal citation omitted); Sword

1 v. Runyon, EEOC DOC 01956313, 1996 WL 284281, at \*2 (EEOC May 17,  
2 1996) (explaining that an employee's "intended use of the EEO  
3 process" constituted protected activity). And there exists  
4 indirect evidence that this intention was communicated to  
5 Hamilton. Most convincing, Jute was removed from the JDE team  
6 just one day after being named as a favorable plaintiff's  
7 witness. Moreover, within a month, Jute claims Hamilton engaged  
8 in two additional retaliatory acts (i.e., the recision of both  
9 the aerobics instructor position and a promised promotion). This  
10 chain of events would allow a jury to infer that Hamilton knew  
11 about Jute's involvement in the Brunton lawsuit. See Gordon v.  
12 New York City Bd. of Educ., 232 F.3d 111, 117 (2d Cir. 2000)  
13 (noting that jury could find employer's knowledge of protected  
14 activity from circumstantial evidence); see also Woodman, 411  
15 F.3d at 83 (observing in Title VII discrimination case that  
16 "[k]nowledge' is a fact often established -- even in criminal  
17 cases where the prosecution's burden is beyond a reasonable doubt  
18 -- simply through circumstantial evidence").

19 To be sure, Jute's participation in the Brunton  
20 litigation was indirect as compared to the situation we would  
21 confront had Jute actually provided deposition testimony. But,  
22 as we recognized in Deravin, Congress chose to provide wide-  
23 ranging protection by shielding an employee who "participate[s]  
24 in any manner" in a Title VII proceeding. 42 U.S.C. § 2000e-

1 3(a). Therefore, we conclude that Congress intended the anti-  
2 retaliation clause to protect a volunteer witness poised to  
3 testify in support of a co-worker's discrimination claims.<sup>6</sup>

4 Having established that Jute engaged in a known,  
5 protected activity by her involvement in the Brunton litigation,  
6 we now turn to whether Jute established the remainder of a prima  
7 facie case.

8 B. Did Jute Establish a Prima Facie Case?

9 \_\_\_\_\_Whether Jute established the remaining elements of a  
10 prima facie case under Title VII principally turns on that  
11 element requiring an employee to demonstrate a causal link  
12 between the protected activity and the adverse action. The  
13 district court held that Jute fell short in doing so because  
14 there existed "significant lapses of time" between Jute's  
15 protected activity in July 1998 and the actionable adverse  
16 employment actions, the earliest of which occurred in September  
17 1999. Jute, 321 F.Supp.2d at 418. We hold that the district  
18 court erred in so ruling for two reasons. First, it did not  
19 consider the events that occurred before September 1999 as  
20 relevant "background evidence." We hold that with proper

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<sup>6</sup> Despite our holding, we emphasize that we do not mean to imply that § 704(a)'s participation clause is so expansive that it encompasses every situation in which a plaintiff is involved in a Title VII proceeding, no matter how passively, a position urged by the EEOC. Rather, as stated, our decision rests on the need to reconcile the particular facts of this case with the congressional intent anchoring the anti-retaliation clause.

1 consideration of these events supporting the actionable claims, a  
2 rational jury could find a causal link between the protected  
3 activity and the actionable adverse acts. Second, the court  
4 erred in not adequately considering certain adverse acts on the  
5 ground that Jute had not specifically raised them in the EEOC  
6 charge. Here too, we hold that this error led the court to  
7 conclude that Jute had failed to sustain a prima facie case. We  
8 address each instance of error in turn.

9 1. Background Evidence

10 An aggrieved employee claiming retaliation must file a  
11 charge with the EEOC no later than 180 or 300 days after the  
12 alleged adverse act occurs, the exact timing dependent on whether  
13 a state has its own agency with authority to investigate the  
14 claim. See 42 U.S.C. § 2000e-5(e)(1). Here, because Jute  
15 initially instituted proceedings before the CCHRO and with the  
16 EEOC, the 300-day limitations period applies. Id. Specifically,  
17 then, as Jute filed her charges on May 18, 2000, the limitations  
18 period allowed Jute to sue only for those adverse acts that  
19 occurred on or after July 23, 1999. As the district court  
20 properly ruled, any discrete acts occurring before that date are  
21 not actionable. See National R.R. Passenger Corp. v. Morgan, 536  
22 U.S. 101, 113 (2002). Jute does not contest that ruling, but  
23 instead asserts that the court impermissibly barred her from  
24 relying on the pre-July 23, 1999 adverse employment acts as

1 background evidence to support the actionable claims. We agree.

2 When, as here, an employee's allegations of retaliation  
3 extend beyond the limitations period, the circumstances  
4 surrounding the claim will determine precisely what consideration  
5 is owed to the time-barred conduct. See Petrosino v. Bell  
6 Atlantic, 385 F.3d 210, 220 (2d Cir. 2004). The statute of  
7 limitations requires that only one alleged adverse employment  
8 action have occurred within the applicable filing period. But,  
9 evidence of an earlier alleged retaliatory act may constitute  
10 relevant "background evidence in support of [that] timely claim."  
11 Morgan, 536 U.S. at 113; see also Petrosino, 385 F.3d at 220,  
12 226. Hence, relevant background evidence, such as statements by  
13 a decisionmaker or earlier decisions typifying the retaliation  
14 involved, may be considered to assess liability on the timely  
15 alleged act. See, e.g., Petrosino, 385 F.3d at 220  
16 (characterizing "earlier promotion denials" as "relevant  
17 background evidence") (internal quotation marks omitted); Lyons  
18 v. England, 307 F.3d 1092, 1101, 1111-12 (9th Cir. 2002)  
19 (explaining that background evidence may include being shifted to  
20 "non-career enhancing jobs" and promotion denials); Roebuck v.  
21 Drexel Univ., 852 F.2d 715, 733 (3d Cir. 1988) (explaining that  
22 decisionmaker's statements of racial bias "standing alone,  
23 occurring as they did over five years before the [adverse  
24 employment action], could not suffice to uphold a finding [of

1 discrimination, although] they do add support, in combination  
2 with the other evidence, to th[at] ultimate conclusion").

3 But the district court chose not to "consider" those  
4 alleged instances of adverse employment action occurring before  
5 July 1999, a choice that significantly altered the nature of  
6 Jute's case. For instance, the pre-July 1999 conduct here, when  
7 considered as background evidence, shows a chain of events that  
8 arose immediately after Brunton's deposition that might support  
9 Jute's timely claims. On July 10, 1998, one day after the  
10 deposition, Jute was shifted from a career-enhancing position  
11 with the JDE team. Then, one week later, Hamilton rescinded a  
12 position that would have allowed Jute to supplement her income by  
13 teaching a Hamilton-sponsored aerobics course. Moreover, less  
14 than a month after Brunton's deposition, Jute was denied a  
15 promised promotion. These facts, although not actionable because  
16 they pre-date July 1999, might nonetheless remain admissible at  
17 trial and could lead a rational jury to find a causal link  
18 between the protected activity and the actionable adverse acts.<sup>7</sup>  
19 Cf. Cifra v. General Elec. Co., 252 F.3d 205, 218 (2d Cir. 2001)  
20 (holding that closeness in time between the protected activity

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<sup>7</sup> In so ruling, we express no view as to whether, at the time of trial, evidence of these incidents ought to be admitted under any applicable rule of evidence. See Fed. R. Evid. 401, 403. The district court retains discretion to determine this issue should the occasion arise. See Malarkey v. Texaco, Inc., 983 F.2d 1204, 1211 (2d Cir. 1993); see also Lyons v. England, 307 F.3d 1092, 1110 (9th Cir. 2002).

1 and evidence of retaliatory action may be unusually suggestive of  
2 retaliatory motive); see also Quinn, 159 F.3d at 769 (reasoning  
3 that causal connection established when protected activity  
4 preceded adverse action by ten days). We therefore hold that the  
5 district court's failure to consider any of the pre-July 1999  
6 acts led it to erroneously conclude that Jute fell short in  
7 establishing the causal link element necessary for a prima facie  
8 case.

9 2. Allegations Absent from EEOC Charge

10 In addition, we find reversible error in the district  
11 court's decision not to consider adverse employment acts that  
12 Jute did not specifically raise in the EEOC charge. "[L]oose  
13 pleading" is permitted before the EEOC. Deravin, 335 F.3d at  
14 202. Thus, "[w]e have recognized . . . that claims that were not  
15 asserted before the EEOC may be pursued in a subsequent federal  
16 court action if they are reasonably related to those that were  
17 filed with the agency." Legnani v. Alitalia Linee Aeree  
18 Italiane, S.P.A., 274 F.3d 683, 686 (2d Cir. 2001) (per curiam)  
19 (internal quotation marks omitted). Reasonably related conduct  
20 is that which "would fall within the scope of the EEOC  
21 investigation which can reasonably be expected to grow out of the  
22 charge that was made." Fitzgerald, 251 F.3d at 359-60 (internal  
23 quotation marks omitted). A complaint of retaliation "could  
24 reasonably be expected to inquire into other instances of alleged

1 [retaliation] by the same actor.” Rose v. New York City Bd. of  
2 Educ., 257 F.3d 156, 163 (2d Cir. 2001).

3 The district court held, however, that it could not  
4 consider the January 2000 claim of retaliatory refusal to list  
5 Jute’s name to IFC for potential hire because, although it arose  
6 within the 300-day limitations period, Jute failed to  
7 specifically mention it in the EEOC charge. Under our relaxed  
8 pleading standard, exclusion on this ground was error. An  
9 investigation into those claims of retaliation explicitly cited  
10 in the charge could “reasonably be expected” to yield evidence of  
11 other possible acts of retaliation that occurred around the same  
12 time. Id. Therefore, the district court erred in not  
13 considering the circumstances surrounding Hamilton’s failure to  
14 list Jute for potential hire to IFC, circumstances that serve as  
15 an example of possible disparate treatment. See Mandell v.  
16 County of Suffolk, 316 F.3d 369, 379 (2d Cir. 2003). Hence, this  
17 evidence underscores even further that Jute has carried the  
18 minimal burden of establishing a prima facie case.<sup>8</sup>

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<sup>8</sup> We note that on similar reasoning the district court dismissed the September 1999 claim of retaliatory refusal to authorize travel with the JDE team. In light of the permissive pleading standard before the EEOC, dismissal on this basis was inappropriate. Nonetheless, we agree with the district court’s ultimate dismissal of this claim for the alternative reason that it does not constitute an “adverse employment action.” See Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005) (explaining that to be materially adverse, a change in working conditions must be “more disruptive than a mere inconvenience or an alteration of job responsibilities”) (internal quotation marks

1 C. May Jute Proceed on Her Negative Job Reference Claim?

2 Before we reach the second step of the burden-shifting  
3 analysis in this Title VII retaliation case, we address the  
4 district court's dismissal of Jute's allegation that Hamilton  
5 retaliatorily furnished a negative job reference. As mentioned  
6 earlier, Jute claimed that her former supervisor, Byron Yost,  
7 advised an inquiring IFC representative that he could not discuss  
8 matters pertaining to Jute because she "had a lawsuit pending"  
9 against Hamilton. Jute correctly asserts that this statement was  
10 false as she had not commenced any such suit when the comment was  
11 made. The district court dismissed this claim, reasoning that  
12 Jute failed to show that Yost's statement caused or contributed  
13 to a job denial. See Jute, 321 F.Supp.2d at 419. Dismissal was  
14 specifically premised on Jute's inability to present an  
15 "affidavit or other sworn testimony from an IFC official  
16 attributing its decision to deny Jute employment to [Yost's]  
17 communication." Id. In so ruling, we hold that the district  
18 court required too much. We therefore vacate the dismissal of  
19 this allegation as well.

20 In order to recover on the negative job reference

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omitted). Jute had been removed from the JDE team over one year before the September 1999 decision denying her the right to travel with the team on business trips. Accordingly, the refusal to authorize travel does not rise to the level of being "adverse." See Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997).

1 claim, Jute must first show that Yost's comment amounted to an  
2 adverse employment action. There exist "no bright-line rules" in  
3 this area, so that "courts must pore over each case to determine  
4 whether the challenged employment action reaches the level of  
5 adverse." Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d  
6 Cir. 1997) (internal quotation marks omitted). In the context of  
7 this case, we hold that a reasonable jury, after hearing the  
8 defendant's evidence to the contrary, could find that Yost's  
9 false statement negatively affected Jute's chances of securing  
10 employment. See EEOC Compliance Manual § 8-II(D) (2) (May 20,  
11 1998) (citing as possible example of post-employment retaliation  
12 "actions that are designed to interfere with the individual's  
13 prospects for employment"); cf. Pantchenko v. C. B. Dolge Co.,  
14 581 F.2d 1052, 1054 (2d Cir. 1978) (per curiam). The claim is  
15 therefore actionable.

16 The district court, however, required Jute to prove too  
17 much when it mandated that she present an affidavit or other  
18 sworn testimony from an official at IFC attributing its non-hire  
19 decision to Yost's comment. As a practical matter, it is  
20 unlikely that an employee could secure such evidence, as such an  
21 admission would subject a potential employer to Title VII claims  
22 of its own. See McMenemy, 241 F.3d at 284; see also EEOC  
23 Compliance Manual § 8-II(C) (4) (Dec. 5, 2000) ("[A] violation  
24 would be found if a respondent refused to hire the charging party

1 because it was aware that she filed an EEOC charge against her  
2 former employer."). Moreover, that IFC is a corporate affiliate  
3 of Hamilton makes it even less likely that Jute could procure  
4 such evidence. Thus, as is true of most Title VII allegations,  
5 to sustain her negative job reference claim Jute is "constrained  
6 to rely on circumstantial evidence." Chambers v. TRM Copy Ctrs.  
7 Corp., 43 F.3d 29, 37 (2d Cir. 1994).

8 Jute provided such evidence. For instance, she  
9 contends that she was offered a job with IFC and seeks to  
10 corroborate this claim through her husband. He testified that  
11 after his wife interviewed with the company in November 2000, an  
12 IFC representative telephoned their home. According to his  
13 testimony, after the telephone call Jute "was very ecstatic,  
14 happy, dancing[,] [a]ctually dancing." Despite Jute's and her  
15 husband's testimony, IFC contends that the job was never offered.  
16 Given these competing versions of events, it would not be  
17 unreasonable for a jury to credit Jute's husband's testimony and  
18 extrapolate that IFC offered Jute a job, but that knowledge of  
19 the lawsuit caused it to rescind the offer. See Sarno, 183 F.3d  
20 at 160.

21 In sum, there exists adequate circumstantial evidence  
22 to permit Jute to proceed to trial on her retaliatory reference  
23 claim.

1 D. Hamilton's Legitimate, Non-retaliatory Reasons for the  
2 Adverse Employment Actions

3 Because the district court did not reach the remaining  
4 steps in the burden-shifting analysis, we ordinarily would be  
5 inclined to proceed no further as well. Hamilton argues that  
6 affirmance might still be warranted because Jute has failed to  
7 offer adequate evidence that would permit a jury to conclude that  
8 Hamilton's justification for its acts really serve as a pretext,  
9 or a mere cover, for retaliation. Under our de novo review, we  
10 elect to address Hamilton's argument that there exists an  
11 alternative ground for affirmance. See id. at 159 ("[W]e are  
12 free to affirm an appealed decision on any ground which finds  
13 support in the record, regardless of the ground upon which the  
14 trial court relied.") (internal quotation marks omitted).

15 Hamilton contends that Jute was terminated due to a  
16 restructuring following a corporate merger. This explanation is  
17 supported in the record by an undated "General Notice" announcing  
18 a post-merger combination of workforce reductions and facility  
19 closings aimed at, among others, the facility where Jute worked.  
20 In addition, Hamilton has produced a list of individuals affected  
21 by the reduction showing that all employees in Jute's pay grade  
22 were terminated along with Jute. Second, and finally, as for  
23 Jute's claims that Hamilton retaliatorily failed to promote her,  
24 Hamilton has sustained its burden of production in offering  
25 legitimate business justifications for these decisions as well.

1 For example, it asserts that in September 1998 Jute effectively  
2 declined the offer of promotion when she refused to be trained on  
3 the night shift. Hamilton further posits that, in any event,  
4 pursuant to a union agreement, the time frame for accepting a  
5 promotion had expired by the time Jute had completed the training  
6 in September 1999.

7 As Jute concedes, these offers of proof satisfy  
8 Hamilton's burden of articulating legitimate, non-retaliatory  
9 reasons to explain the actionable claims of adverse employment  
10 action.<sup>9</sup>

11 E. Did Jute Present Sufficient Evidence that Would Permit  
12 a Jury to Find Hamilton's Proffered Reasons Were  
13 Pretext for Retaliation?

14 We now arrive at the final step of the Title VII  
15 burden-shifting test requiring Jute to show that retaliation was  
16 a substantial reason for Hamilton's adverse actions. We are  
17 satisfied that, on this record, Jute carried her burden on this  
18 step.

19 In particular, Jute has proffered evidence supporting a  
20 strong temporal connection between her involvement in protected

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<sup>9</sup> We note that before us Hamilton did not seek affirmance of the dismissal of the retaliatory reference claim by offering a legitimate, non-retaliatory reason to explain that conduct. Instead, Hamilton principally argued that affirmance was warranted because Jute had failed to show that the comment motivated IFC's non-hire decision, an argument that we have already rejected. We therefore have no occasion to consider the second or third steps of the burden-shifting analysis with respect to this claim.

1 activity on the one hand, and instances (albeit, not actionable)  
2 of retaliation on the other. See Quinn, 159 F.3d at 770. As we  
3 must construe the record in the light most favorable to Jute at  
4 this stage of the case, see Anderson, 477 U.S. at 255, "we  
5 conclude that there is a sufficient basis for a trier of fact to  
6 doubt the persuasiveness of [Hamilton's] proffered evidence and  
7 ultimately to find that the [legitimate, non-retaliatory] reasons  
8 offered by [Hamilton] . . . were pretextual." Quinn, 159 F.3d at  
9 770.

#### 10 IV.

11 As set forth above, the district court properly held  
12 that Jute's participation in a co-worker's Title VII lawsuit  
13 amounted to protected activity. But, there exist genuine issues  
14 of material fact as to Jute's retaliation claims, such that the  
15 grant of summary judgment in favor of Hamilton was inappropriate.  
16 Accordingly, the judgment of the district court is affirmed in  
17 part, vacated in part, and remanded for trial. We emphasize that  
18 in so ruling we intimate no view as to the ultimate merits of  
19 Jute's claims at trial. We hold today only that the district  
20 court prematurely interrupted Jute's right to present her case to  
21 a jury, such that now "the 'curtain' should rise," Patrick v.  
22 LeFevre, 745 F.2d 153, 158 (2d Cir. 1984), and the claims should  
23 be tried.